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No. _____

In the
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

Richard W. Tokheim,

Petitioner

v.

Commodity Futures Trading Commission,

Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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Appellant

57 pp

QUESTION PRESENTED

May an individual's Fifth Amendment right to due process be compromised by the lower court's waiver of the threshold test established in *United States v. Powell*, 379 U.S. 48, 57 (1964) as a condition precedent to the judicial enforcement of an administrative subpoena.

May a default judgment be entered against a respondent who (i) files his responsive pleading, supported by an affidavit, to object; and, (ii) appears by counsel at the appointed time for the hearing.

Does the Commodity Exchange Act, 7 U. S. C. § 1, et seq., facially violate the First Amendment of the U.S. Constitution because it prohibits the publication of non-personal commodity trading advice without registration with the government.

Is the Commodity Exchange Act, 7 U. S.C. §1, et seq., facially overbroad because it allows the Commodity Futures Trading Commission unlimited discretion to select who may, and who may not, publish non-personal commodity related investment advice.

PARTIES TO THE PROCEEDINGS

The parties in interest are listed in the caption. The Commodity Futures Trading Commission is an agency of the United States government which is supervised by the United States Congress.

TABLE OF CONTENTS

	Page
Question Presented	i
Parties to the Proceedings	ii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of Case	3
The Proceedings Below	4
Reasons for Granting the Writ	5
I. The Petition Should Be Granted Because The Lower Courts Exceeded Their Authority When They Denied The Application Of The *Powell* Test As A Condition Precedent To The Judicial Enforcement Of A Government Subpoena Against Tokheim	5
II. The Petition Should Be Granted Because The Lower Courts Entered A Default Judgment Against Tokheim In Favor Of The Government In Violation Of Tokheim's Right To Due Process Guaranteed By The Fifth Amendment.	9
III. The Petition Should Be Granted Because Tokheim Will Be Irreparably Damaged If The Government Is Allowed To Canvas His Subscribers.	12
IV. The Petition Should Be Granted Because The Commodity Exchange Act Facially Violates The	

First Amendment To The United States Constitution 13

Conclusion 27

TABLE OF AUTHORITIES

Cases Cited:

Alexander v. United States, 509 U.S. 544, 550 (1993) 21

In the Matter of Armstrong, 1989 CFTC LEXIS 558 (1989) 18

In the Matter of Armstrong, Comm.Fut.L.Rep. 25,657 (Feb. 8, 1993), 1993 CFTC LEXIS 34 ..... 18 - 20

Board of Trustees v. Fox, 492 U.S. 469, 481-82, 484 (1989) 26

Branzburg v. Hayes, 408 U.S. 665, 704 (1972) 22

Brown v. Glines, 444 U.S. 348, 353-58 (1980) 23

Commodity Futures Trading Commission v AVCO Financial Corp., No. 97 Civ. 3119 (JFK) (S.D.N.Y., September 29, 1997) 12

Commodity Futures Trading Commission v AVCO Financial Corp., Section II on page 43,979, of [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) #26,719 ..... 12, 13

Commodity Trend Service v CFTC, No. 97-3477 (7th Circuit, 1978) 20

Drummond Coal Company v Watt, 735 F.2d 469,474, (11th Cir. 1984) 14

EEOC v. Quad/Graphics, Inc., 63 F.3d 642, 644-45 (7th Cir. 1995) ..... 3, 6 - 10

F.D.I.C. v. Garner, 126 F.3d 1138, 1144, (9th Cir. 1997) 7

Federal Election Comm'n v. Machinists' Non-Partisan Political League, 655 F.2d at 390 n.19 26

Forsyth County, Georgia v. The Nationalist Movement, 505 U.S. 123, 129 (1992) 14, 26

Federal Trade Comm'n v. Miller, 549 F.2d at 460 ..... 9, 26

Freedman v. Maryland, 380 U.S. 51, 58-60 (1965) 23

Ginsburg v Agora, Inc. 915 F. Supp. 733, 736 n7, (D.Md. 1995) 18, 19, 22

Lovell v. City of Griffin, 303 U.S. 444, 451 (1938) 21

Lowe v SEC, 472 U. S. 181 (1985) ..... 3, 10, 15, 17 - 28

Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 504 n-11 (1981) 14, 26

Moragne v States Marine Lines, Inc., 398 U. S. 375 (1970). 8

National Life Ins. Co. v. Phillips Publ'g. Inc., 793 F. Supp. 627, 648 (D.Md. 1992) 22

Near v. Minnesota, 283 U.S. 697, 716 (1931) 23

Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976) ... 23

New York Times Co. v. United States, 403 U.S. 713, 714 (1971) 23

Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) 20

Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971) 23

In re Pan Am Corp., 161 Bankr. 577, 584 (1993) 22

BEST AVAILABLE COPY

Penthouse Int'l, Ltd. v. Playboy Enter., Inc., 392 F. Supp. 257, 261 (S.D.N.Y. 1974) 13

In re Petroleum Prods, Antitrust Litigation, 680 F.2d 5, 7-8 (2d Cir. 1982) 22

Pickering v Owens-Corning Fiberglass Corp., 265 Ill. App 3d 806, 203 Ill. Dec. 1, 638 N. E. 2d 1127, 1138, (Ill. App. 5th Dist. 1994) 11

In the Matter of Polyaxon Capital. Inc., 1988 CFTC LEXIS 166 (1988) 17

Resolution Trust Corp. v. Walde, 18 F.3d 943 (D.C. Cir. 1994) 14, 27

Ryan v Bening, 66 Ill. App. 3d 127, 22 Ill.Dec. 873, 353 N. E. 2d 681, 683, (Ill. App. 5th District 1978) 11

In re Scott Paper Co. Securities Litigation, 145 F.R.D. 366, 370 (E.D. Pa. 1992) 22

Staub v. Baxley, 355 U.S. 313, 322 (1958) 21

Thomas v. Collins, 323 U.S. 516 (1945) 21

Thornhill v. Alabama, 3 10 U.S. 88, 97 (1940) 21

United States v. Powell, 379 U.S. 48, 57 (1964) ..... 3 - 10, 28

United States v Russell, 282 F. Supp. 106 (USDC ED Pa 1968) 10

United States v Woodard, 938 F. 2d 1255, 1258 (11th Cir. 1991) 8

Zinemon v Burch, 494 U.S. 113, 127 (1990) 11

Statutes Cited:

17 C.F.R. § 3.60 24

15 U.S.C. [Investment Advisers Act of 1940 a ("40Act")] § 80b-2(a)(11) 15

5 U. S. C. § 556(b) [§7 of the Administrative Procedures Act] 14

7 U.S.C. [Commodity Exchange Act ("CEAct")] § 1a(5)(A) 15

7 U.S.C. § 1a(5)(B) 16

7 U.S.C. § 6m [§ 4m of the CEAct] 16, 19, 22, 27

7 U. S. C. § 6b & o [§ 4b & o of the CEAct] 25

7 U.S.C. § 9 25

7 U.S.C. § 12a 24

7 U.S.C. § 12a(3)(A) 24

7 U.S.C. § 12a(3)(M) 24

7 U.S.C. § 13a 25

7 U.S.C. § 13b 25

7 U.S.C. §§ 15 and 12(a)(1) [§§ 6(c) and 8(a)(1) of the CEAct] .....

United States Constitution Cited:

U. S. Constitution, Amendment Five 9, 11

U. S. Constitution, Amendment One ..... 4, 9, 13 - 25

Other Authorities Cited:

Emerson, The Doctrine of Prior Restraint, 20 Law & Contemp. Probs. 648 (1955) 21

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Tribe, Constitutional Law, section 12-34 (2d ed. 1988) 21

Richard W. Tokheim ("Tokheim") hereby Petitions for a Writ of Certiorari be issued to review a judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The Court of Appeals Slip Opinion (App., *infra*, A) dated August 18, 1998 is unreported. The Court of Appeals denial of the Petition for Rehearing and Suggestion of En Banc Consideration, (App., *infra*, B) dated October 22, 1998 is unreported. The denial of the Petition for Reconsideration by the District Court (App., *infra*, C) entered on December 4, 1997 at case number 97-C-6138 is unreported. The District Court denial of Appellant's Motion for Protective Order and Other Relief (App., *infra*, D) entered on November 12, 1997 is unreported. The District Court denial of Tokheim's Motion to Dismiss and for a Protective Order dated October 30, 1997, (App., *infra*, E) is unreported. The District Court Magistrate Order dated October 23, 1997 enforcing the CFTC subpoena (App., *infra*, F) is unreported.

JURISDICTION

The final order of the Court of Appeals was the denial of Tokheim's Petition for Rehearing and Suggestion for Rehearing En Banc (App., *infra*, B) on October 22, 1998. This Petition is filed, and the three hundred dollar ($300) fee paid, pursuant to 28 U.S.C. Section 1254 (1) and Supreme Court Rule 13.3, within ninety (90) days of the entry of the final order.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution, in relevant part, provides: "Congress shall make no law ... abridging the freedom of speech, or of the press; ...".

The Fifth Amendment to the United States Constitution provides in relevant part: "no person shall . . .be deprived of life, liberty, or property, without due process of law ...".

Commodity Exchange Act, 7 U.S.C. § 1, et seq., (the "CEAct") provides:

> At Section 1a(5)A, a commodity trading advisor ("CTA") is defined as a person who,
>
> (i) for compensation or profit, engages in the business of advising others, either directly or through publications, writings, or electronic media, as to the value or advisability of trading in
>
> (I) any contract of sale of a commodity for future delivery made or to be made on or subject to the rules of a contract market;
>
> (II) any commodity option authorized under section 4c; or
>
> (III) any leverage transaction authorized under section 19;
>
> or
>
> (ii) for compensation or profit, and as part of a regular business, issues or promulgates analyses or reports concerning any of the activities referred to in clause (i).
>
> Certain categories of persons are excluded from the definition of CTA, including "the publisher or producer of any print or electronic data of general and regular dissemination, including its employees." 7 U.S.C. Section 1a (5)(B). Subject, however, to a finding that the persons' services are "solely incidental to the conduct of their business or profession." 7 U.S.C. Section 1a(5)(C).

Section 4m of the CEAct provides:

"(1) It shall be unlawful for any commodity trading advisor ..., unless registered ..., to make use of the mails or any means or instrumentality of interstate commerce in connection with his business as such commodity trading advisor...". 7 U.S.C. § 6m.

STATEMENT OF THE CASE

In response to an application to enforce an administrative subpoena, Tokheim filed his pleading, supported by his affidavit, to assert (i) that his business was exempt from registration because of the rule announced in *Lowe v SEC*, 472 U. S. 181 (1985) which exempts government restraint upon the publication of non-personal trading advice; and (ii) that the United States District Court for the Northern District of Illinois had neither the jurisdiction nor was the proper venue to enforce an administrative subpoena against a resident of Nebraska. Thereafter, Tokheim, by legal counsel, appeared for the hearing on the merits of the application.

On October 23, 1997, without requiring the government to demonstrate compliance with the criteria established by *United States v. Powell*, 379 U.S. 48, 57 (1964) or the threshold showing required of the government established by the 7th Circuit in *EEOC v. Quad/Graphics, Inc.*, 63 F.3d 642, 644-45 (7th Cir. 1995), a District Court Magistrate order was entered and affirmed by the District Court Judge directing Tokheim to appear for his deposition and deliver all requested documents, including his subscriber list and research materials, in response to an administrative subpoena issued by the Commodity Futures Trading Commission ("CFTC"), an agency of the United States government.

On November 13, 1997, Tokheim appeared for his deposition and produced all relevant documents and information, including those necessary to demonstrate that he had not acted as either a commodity broker or commodity trading advisor. Tokheim refused to deliver his subscriber list and his research materials under the claims that (i) they are exempt from disclosure because

the CFTC cannot satisfy the tests announced in *Powell* and *Quad/Graphics, Inc.*; (ii) the information is protected from intrusion by the government by the First Amendment; (iii) the lower courts did not have jurisdiction; and, (iv) Chicago, Illinois, was not the proper venue to enforce an administrative subpoena against a non-registered resident of Nebraska.

The 7th Circuit, without remand for further proceedings, has ordered Tokheim to immediately deliver his subscriber list and materials to the government.

Tokheim asserts (i) his subscriber list and research materials cannot possibly be relevant to any investigation of him by the CFTC pursuant to the CEAct; (ii) once his subscriber list is delivered to and canvassed by the CFTC, his business would be destroyed; and, (iii) the threat of penalties for his failure to register as a commodity trading advisor has *chilled* his exercise of free speech guaranteed by the First Amendment.

THE PROCEEDINGS BELOW

On August 29, 1997, the CFTC filed an application to the United States District Court for the Northern District of Illinois (the "District Court") for an order to show cause why Tokheim, a resident of Omaha, Nebraska, should not be ordered to comply with an administrative subpoena.

On October 22, 1997, Tokheim timely filed a Motion to Dismiss the CFTC Application or, in the alternative, for a Protective Order and Attorneys Fees, supported by his affidavit.

On October 23, 1997, Magistrate Judge W. Thomas Rosemond, Jr., without requiring the government to put any evidence into the record, entered an Order to enforce the CFTC subpoena (the "Subpoena"). App F.

On October 30, 1997, the District Court denied Tokheim's Motion to Dismiss and for a protective order. App E.

On November 6, 1997, Tokheim appealed the Order of the Magistrate entered on October 23, 1997 to the District Court Judge.

On November 12, 1997, the District Court, without a hearing, affirmed the Magistrate Order of October 23, 1997. App D.

On November 20, 1997, Tokheim filed his Motion for Reconsideration of the Order of November 12, 1997, to object to the compelled delivery of his subscriber list and research materials.

On December 3, 1997, the CFTC filed a Petition for an Order to Show Cause why Tokheim should not be held in contempt which the CFTC voluntarily stayed pending appeal.

On December 4, 1997, the District Court denied Tokheim's Motion for Reconsideration. App C.

On December 12, 1997, Tokheim appealed to the 7th Circuit Court of Appeals.

On August 18, 1998, by Slip opinion, the 7th circuit affirmed the Distriet Court ruling. App A.

On October 22, 1998, the Seventh Circuit denied Tokheim's Petition for Reconsideration and Suggestion of En Banc Consideration. App B.

Tokheim Petitions this Court for Writ of Certiorari to the 7th Circuit.

REASONS FOR GRANT OF THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE APPEALS COURT EXCEEDED ITS AUTHORITY WHEN IT REFUSED TO APPLY THE THRESHOLD TEST ANNOUNCED IN *UNITED STATES V. POWELL*, 379 U.S. 48,

57 (1964) AS A PREREQUISITE TO ENFORCEMENT OF A FEDERAL GOVERNMENT SUBPOENA.

The Orders by the Magistrate on October 23 and the District Court on November 12, 1997 were entered without the presentation of any evidence by the CFTC other than the affidavit of Ken Hampton attached to the Application to Enforce the Subpoena which merely explained the history of the CFTC attempts to cause Tokheim to comply.

The 7th Circuit found that the record created by the District Court did not demonstrate the existence of the factors required as a prerequisite to the enforcement of a Federal government subpoena established in *United States v. Powell*, 379 U.S. 48, 57 (1964) or by the 7th Circuit in *EEOC v. Quad Graphics, Inc.*, 63 F.3d 642, 644-45 (7th Cir. 1995). Slip opinion, App A, page 7, second paragraph. Rather than remand the case with instructions that a record be created, the 7th Circuit also disregarded the *Powell* and *Quad/Graphics, Inc* tests by directing Tokheim to comply with the Subpoena.

The criteria announced in *Powell* are: "the government must establish that: (1) its investigation is being conducted pursuant to a legitimate purpose, (2) the specific inquiry may be relevant to that purpose, (3) the information sought is not already in the Commission's possession, and (4) the proper administrative procedures required by the applicable statutes and regulations have been followed." *Powell*, 379 U.S. at 57-58.

The 7th Circuit also said that it had stated the *Powell* standard somewhat differently. *See* App A, page 7 and *Quad/Graphics, Inc.*, 63 F.3d at 644-45 ("As a general proposition, courts enforce an administrative subpoena if it seeks reasonably relevant information, is not too indefinite, and relates to an investigation within the agency's authority."). The 7th Circuit held that both the *Powell* and *Quad/Graphics* articulations of the standard have the same effect in operation, particularly in light of the fact that the court must be satisfied that the demand for

information has not "been made for an illegitimate purpose," and that an "excessively burdensome" demand, compliance with which would threaten the normal operation of a respondent's business, will not be enforced. Slip opinion, App. A, page 7, which cited *Quad/Graphics, Inc.*, 63 F.3d at 645.

The Circuit Court justified the finding that no evidence must be in the record to satisfy either the *Powell* or *Quad/Graphics* threshold tests in this case because the deficiency in the record and proceedings in the lower court was largely due to the fact that Tokheim did not adequately appear in the district court at the hearing scheduled to contest the Subpoena's validity, rendering the district court's order akin to a default judgment. App A, page 7.

The Circuit Court further justified the District Court's failure to establish a proper record by finding that: (i) there has been a long delay in enforcing the Subpoena resulting from Tokheim's contumacy; and, (ii) there exists clear support for the Subpoena contained in the record. App A.

Only after the government proves, on the record, that the *Powell* test was met does the burden shift to Tokheim to demonstrate that compliance with the subpoena would be burdensome. *F.D.I.C. v. Garner,* 126 F.3d 1138, 1144, (9th Cir. 1997). Tokheim justified his position to the District Court in his responsive pleadings and supporting affidavit. Until the government provides a sufficient record to satisfy the *Powell* tests, Tokheim's right to be free from the unreasonable exercise of government Subpoena power must be preserved.

On November 13, 1997, Tokheim appeared for his deposition and answered all questions and produced all documents requested by the Subpoena, except for his subscriber list and the research information provided to his subscribers. Tokheim's only actions regarding the Subpoena were to either assert his legal rights or to appear for his deposition and produce documents. That action should never be characterized by the courts as contumelious or vexatious without a written record which contains facts to justify

that conclusion. No such record exists in this case. No proof exists that Tokheim's actions were interposed to delay the proceedings.

In addition, the past or future threat of delays in the proceedings do not justify a waiver of the government's burden to prove the *Powell* and *Quad/Graphics* tests were met. Tokheim justifiably relied upon these tests and the *Lowe* case when he established his business. Now, without any justification in the record, the lower courts have disregarded these rules of law.

The government has the burden to prove the relevance to justify its application to enforce the Subpoena. That burden does not shift merely because Tokheim elects to appear at the hearing by his counsel rather than in person. Neither the government agency nor the lower courts may select how Tokheim will appear for a civil hearing or suggest the extent of the preparation necessary to permit counsel to participate in the hearing. Certainly, the quality of appearance by the Respondent is not relevant to the affirmative duty the government had to satisfy the burden of proof on the record that the *Powell* and *Quad/Graphic* tests were met. The 7th circuit exceeded its authority when it elected to waive the requirement that a lower court record demonstrate the *Powell* tests had been met. *Moragne v States Marine Lines, Inc.*, 398 U. S. 375 (1970); *United States v Woodard*, 938 F. 2d 1255, 1258 (11th Cir. 1991).

Stability and predictability are essential factors in the proper operation of government by rule of law. In *Moragne v. Sates Marine Lines, Inc.*, 398 U.S. 375, 90 S.Ct. 1772, 26 L.Ed. 2d 339 (1970), this Court states the reasons for following past decisions:

> "Among these are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of

> maintaining public faith in the judiciary as a source of impersonal and reasoned judgments."

Id., at 403, 90 S.Ct. at 1789. The refusal of the lower courts to require the government to satisfy the *Powell* test is contrary to the rule of law announced in *Moragne.*

An important element of this request for review is the fact that the government can not satisfy the *Powell* test. As explained below, the definition of a commodity trading advisor contained in the CEAct facially violates the First Amendment. And, the exemptions to the definition of a commodity trading advisor divest the CFTC of jurisdiction to issue a subpoena directed to Tokheim. *Federal Trade Commission v Miller,* 549 F.2d 452, 1977 Fed. Carr. Cas. (CCH) ¶ 82,675, 1977-1 Trade Cas. (CCH) ¶ 61,265 (7th Cir 1977).

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE LOWER COURTS ENTERED A DEFAULT JUDGMENT AGAINST TOKHEIM IN FAVOR OF THE UNITED STATES GOVERNMENT IN VIOLATION OF TOKHEIM'S RIGHT TO DUE PROCESS GUARANTEED BY THE FIFTH AMENDMENT.

In paragraph 2 of the Application to enforce the subpoena, the government pleads: "Respondent Richard W. Tokheim ("Tokheim"), who resides at 9411 Manderson Street, Omaha, Nebraska 68134, has never been registered with the (sic CFTC) Commission in any capacity. In his response, Tokheim admitted these facts and asserted the CFTC has neither the jurisdiction nor the venue to investigate Respondent without his consent or probable cause for the investigation.

The lower courts have failed to consider Tokheim's Response and affidavit filed to controvert the CFTC Application to enforce its Subpoena. Specifically, this was Docket entry number 12, filed 10/22/97, the Tokheim Motion to Dismiss which included

the Tokheim affidavit dated October 20, 1997 as Exhibit 1. In his affidavit, Tokheim affirmatively states, among other things, that (i) his business consists solely of the sale of non-personal commodity research for a fee, (ii) he operates his business under the guidelines announced in *Lowe v SEC*, 472 U. S. 181 (1985) which authorizes the distribution of opinion for a fee as protected free speech, (iii) he did not hold himself out as a broker, and (iv) he had no knowledge of any complaints from any of his customers.

Once Tokheim appeared and placed his defenses in the record, the burden was on the CFTC to place sufficient contrary evidence in the record to establish a "prima facie" case. No evidence was presented by the CFTC. The District Court, without a hearing, accepted the exhibits attached to the Petition filed by the CFTC as uncontroverted.

Upon appeal, the 7th Circuit acknowledged that the District Court did not evaluate the propriety of enforcement of the subpoena in accordance with the analyses required by either *Powell* or *Quad/Graphics*. The 7th Circuit then supplied, without any support from the record, its interpretation of why the District Court did not conduct this evaluation. It concluded that Tokheim did not adequately appear before the District Court at the scheduled hearing to contest the Subpoena's validity on October 23, 1997.

The purpose of establishing a trial transcript is to perpetuate precisely what was considered by the trial court. *United States v Russell*, 282 F. Supp. 106 (USDC ED Pa 1968). There is nothing in the record to suggest that the appearance of local counsel for the hearing on October 23, 1997 was less than adequate.

The 7th Circuit characterized the lower court decision as a default judgment against Tokheim. That is contrary to the facts. Tokheim filed his appearance, responsive pleading, supporting affidavit, and appeared by local counsel at the hearing. Accordingly, Tokheim was ready to cross examine the government witnesses, call witnesses and present evidence on his behalf. Tokheim's pleadings and representation at the hearing by counsel

on October 23, 1997 were more than adequate to protect all of his rights, including his Fifth Amendment right to a hearing before he may be compelled to comply with the government administrative subpoena. *Zinemon v Burch*, 494 U.S. 113, 127 (1990).

Tokheim's local counsel never intended to testify. Without waiver of the contention that local counsel was well prepared, the depth of his knowledge is irrelevant to Tokheim's right to the establishment of a prima facie case by the government in the record. What is relevant is that Tokheim filed his written objection to the application to enforce the Subpoena with a supporting affidavit, and local counsel was present and ready to represent Tokheim's interests.

Nothing is in the record to justify the finding by the 7th Circuit that Tokheim defaulted or otherwise waived any of his rights. Tokheim's absence when the hearing commenced did not preclude him from appearing at any future stage of the hearing. In addition, there is no law which requires a respondent to appear personally in a civil case. Tokheim could legally introduce evidence through affidavit, experts and third parties.

Assume, for argument sake, that the appearance of local counsel were inadequate, the law provides that once a defendant appears and places the allegations in the complaint at issue, the trial court cannot enter a default judgment merely because the defendant fails to appear at trial. The plaintiff must proceed to prove his claim as if the defendant had been present to try his case. *Ryan v Bening*, 66 Ill. App. 3d 127, 22 Ill.Dec. 873, 353 N. E. 2d 681, 683, (Ill. App. 5th District 1978); cited with approval in *Pickering v Owens-Corning Fiberglass Corp.*, 265 Ill. App 3d 806, 203 Ill. Dec. 1, 638 N. E. 2d 1127, 1138, (Ill. App. 5th Dist. 1994).

III.

THE PETITION SHOULD BE GRANTED BECAUSE TOKHEIM WILL BE IRREPARABLY DAMAGED IF THE GOVERNMENT IS ALLOWED TO CANVAS HIS SUBSCRIBERS.

Had the lower courts permitted Tokheim to present evidence, he would have provided numerous examples of the destruction by the CFTC of commodity publishing businesses similar to his that have occurred when the CFTC is permitted to contact subscribers. The CFTC methodology is to drive away the small publishers' subscribers and then pick the bones of the financially strapped publishers' remains to establish sufficient legal precedent to justify judicial determination that the publishers violated the CEAct.

An example of this tactic is reported in the recent case of *Commodity Futures Trading Commission v AVCO Financial Corp.*, No. 97 Civ. 3119 (JFK) (S.D.N.Y., September 29, 1997). The description of the CFTC contact with subscribers and its effect upon AVCO is described at Section II on page 43,979, of [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) #26,719. The fact AVCO is totally out of business is a matter of public record. Further investigation reveals the fact that AVCO was financially unable to defend the charges made against it when the CFTC enforcement action commenced because the canvas of the AVCO subscribers had destroyed its cash flow..

The present threat of destruction of Tokheim's business by the CFTC is real. Any telephone call from the CFTC to a Tokheim subscriber will cast doubt upon the quality of the research he provides. The competitiveness of the commodity publication marketplace will cause Tokheim to lose subscribers once the CFTC circulates the fact of the investigation to Tokheim's subscriber list of less than 50 persons and the public at large. The CFTC works hard to gain headlines to describe its actions. The CFTC's objective is to avoid absorption into the Securities and Exchange

Commission by demonstrating to Congress that it is actively policing the commodity industry.

An example of the news seeking effort by the CFTC is demonstrated by the report in *AVCO* of the call from a CFTC representative to the Club 3000 news editor, *see* footnote number 1 on page 43,980 of [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) #26,719. The CFTC representative claimed he made the call to a newsletter publication without the expectation that they would publish the fact the AVCO investigation was in progress.

The court in *AVCO* cited the case of *Penthouse Int'l, Ltd. v. Playboy Enter., Inc.*, 392 F. Supp. 257, 261 (S.D.N.Y. 1974) to demonstrate that injury to business reputation and goodwill may be sufficient to establish injury and deny enforcement of a subpoena. However, the court in that case found that such damages are not always irreparable. That case is easily distinguished from this case. Publishers of sex based magazines can recover from reputation damage because their reputation is not a factor in the sale of the material they produce. In Tokheim's business, the sale of commodity research, a solid reputation is the mainstay of the sale. Inquiry of his subscribers by the CFTC will permanently destroy his business.

To protect Tokheim, the government must be required to prove a prima facie case before the proper venue and Tokheim must, thereafter, be afforded the opportunity to rebut the government evidence to the effect that the delivery of his subscriber list and research information (i) will not produce any evidence relevant to the investigation; and, (ii) will result in a substantial, if not total, destruction of his business.

IV.

THE PETITION SHOULD BE GRANTED BECAUSE THE COMMODITY EXCHANGE ACT FACIALLY VIOLATES THE FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. The Registration Requirement Constitutes An Impermissible Prior Restraint On Tokheim's Publication Of Newsletters In Violation Of The First Amendment.

The constitutionality of the CEAct's registration of CTA's is at issue in this action because the Petition to Enforce the Subpoena and for an Order to Show Cause for Contempt filed to the District Court defines the scope of the investigation to include the provision of research and opinion which, under the threat of delivery, have *chilled* the exercise of free speech guaranteed to Tokheim under the First Amendment. Therefore, if the Court finds that the definition of a CTA, after consideration of the exceptions, violates the First Amendment, the investigation of Tokheim would be narrowed to preclude an investigation or proceeding to determine if Tokheim is required to be registered as a CTA. *See Resolution Trust Corp. v. Walde*, 18 F.3d 943 (D.C. Cir. 1994) (narrowing scope of RTC investigation to preclude Inquiry into unauthorized matters).

The application of the Fifth Amendment or §7 of the Administrative Procedures Act, (the "APA") 5 U. S. C. § 556(b) and the rules announced in *Drummond Coal Company v Watt*, 735 F.2d 469,474, (11th Cir. 1984) do not apply to those who contend the law in question specifically excludes them. *Walde,* 18 F.3d 943.

Tokheim adequately preserved his rights in his responsive pleading; or, in the alternative, lack of jurisdiction and venue to entertain an action applies to administrative proceedings and may be contested at anytime, including the raise of First Amendment issues to appellate courts. *See Forsyth County, Georgia v. The Nationalist Movement*, 505 U.S. 123, 129 (1992); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 504 n-11 (1981).

Tokheim publishes commodity trading newsletters. For First Amendment purposes, his publications are not distinguishable

from the publications which were at issue in *Lowe v. SEC*, 472 U. S. 181 (1985). The only difference in the publications is that Lowe addressed stock trading while Tokheim's publications concern commodity trading. The legal issue in the instant case is virtually identical to the issue presented to the Supreme Court in *Lowe*: can a registration requirement be constitutionally applied to publishers who neither manage customer funds nor offer personalized investment advice? As noted previously, *Lowe* is the most closely analogous Supreme Court case to the instant matter. Therefore, it is important to set forth the reasoning and holding of that case and how it relates to Tokheim's challenge.

Christopher Lowe was the president of an investment corporation and a registered investment adviser with the SEC (*SEC v. Lowe*, 472 U.S. at 183). After being convicted of several crimes, including theft and fraud, Lowe's registration was revoked. *Id.* Nevertheless, he sought to publish an investment advisory newsletter which analyzed general market trends and recommended buying and selling specific securities. *Id.* The SEC sought to stop Lowe from publishing because he was not registered, and that it was illegal to act as an "investment adviser" under the Investment Advisers Act of 1940 ("40Act"), 15 U.S.C. § 80b-2(a)(11), without registration. The 40Act defines investment adviser as follows:

> (11) "Investment adviser" means any person who, for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities, or who for compensation and as part of a regular business, issues or promulgates analyses or reports concerning securities ...

Tracking almost the precise language of the 40Act, section 1a(5)(A) of the CEAct defines a "Commodity Trading Advisor" as any person who:

> (i) for compensation or profit engages in the business of advising others, either directly or through

publications, writings, or electronic media, as to the value of or the advisability of trading in–

(I) any contract of sale of a commodity for future delivery made or to be made on or subject to the rules of a contract market;

(II) any commodity option authorized under section 6c of this title; or

(III) any leverage transaction authorized under section 23 of this title; or

(ii) for compensation or profit, and as part of a regular business, issues or promulgates analyses or reports concerning any of the activities referred to in clause (i).

Also, like the 40Act, it is illegal to perform the functions of Commodity Trading Advisor without being registered with the CFTC. 7 U.S.C. § 6m.

The 40Act specifically excludes certain activities and persons from the definition of an investment adviser, including:

(D) the publisher of any bona fide newspaper, news magazine or business or financial publication of general and regular circulation.

Like the 40Act, subparagraph (B) of section 1a(5) of the CEAct contains specific exclusions from the definition of a CTA. Among those exclusions is:

the publisher or producer of any print or electronic data of general and regular dissemination, including its employees.

After the United States Court of Appeals for the Second Circuit ruled against *Lowe*, the U.S. Supreme Court granted

certiorari to decide whether the SEC could prevent Lowe–because he was not registered–from publishing non-personal investment advice without violating the First Amendment. The Supreme Court unanimously reversed the court of appeals and held that Lowe could not be prevented from publishing without registration. The majority opinion in *Lowe*, 472 U.S. at 204-10, avoided the direct constitutional issue by finding that Lowe's publication fit within the "bona fide publications" exception of the 40Act stated above. According to the majority opinion, Congress intended only to require registration of those securities advisers that offered personalized investment advice: "The [sic 40]Act was designed to apply to ... those who provided personalized [investment] advice attuned to a client's concerns .... The mere fact that a publication [provides] advice ... about specific securities does not give it the personalized character [of an investment adviser]." *Id.*, at 207-08. Congress, the majority reasoned, did not intend to begin licensing non-personal publishers in violation of the First Amendment. *Id.*, at 204. Lowe was permitted to continue to publish his advisory newsletters without registering as an investment adviser and without fear of prosecution. *Id.*, at 211.

Three concurring Justices in *Lowe*, 422 U.S. at 211-35, would have decided the case on First Amendment grounds exclusively, reasoning that the First Amendment does not permit the government to require registration of those who publish non-personal investment advice. They concluded that the 40Act as applied to publishers was unconstitutional.[1]

As a result of the *Lowe* decision, the SEC does not apply the registration requirement in the 40Act to publishers who write about the securities markets. Also, in light of *Lowe* and the striking similarities between the two laws, two administrative law judges at the CFTC, in the late 1980s, held that the publishers of non-personal information and advice on futures trading could not be subject to the registration requirement. *See In the Matter of*

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[1] The concurring Justices also sharply disagreed with the majority's interpretation of the 40Act's legislative history.

Polyaxon Capital. Inc., 1988 CFTC LEXIS 166 (1988); *In the Matter of Armstrong*, 1989 CFTC LEXIS 558 (1989). However, in 1993, the CFTC reversed the ALJ's positions, holding that even the publisher of non-personal investment advice, opinions, and information about futures trading must register as a CTA. *In the Matter of Armstrong*, Comm.Fut.L.Rep. 25,657 (Feb. 8, 1993), 1993 CFTC LEXIS 34.

The CFTC and the lower courts refused to apply the *Lowe* decision to this case in conflict with the finding by the District Court of Maryland that the decision in *Lowe* does apply to the publication of non-personal commodity trading advice. *Ginsburg v Agora, Inc.* 915 F. Supp. 733, 736, (D. Md. 1995). *Ginsburg* held that the statutory definition of an investment advisor under the 40Act, 15 U.S.C. §77l, is substantially the same as the definition of a CTA under the CEAct. *Id.*

Further, the CFTC interpretation of subsection (B) of the CEAct and the "solely incidental" language of subsection (C) excludes such publications as Forbes, Barron's, and the Wall Street Journal from the registration requirement. These publications offer information similar to the information available in Tokheim's newsletters; i.e., commodity trading advice. But because the futures information in those publications is "incidental" to their main focus, the CFTC has determined that they are exempt from registration while Tokheim must register because commodity advice is his only business. *In the Matter of Armstrong*, Comm.Fut.L.Rep. 25,657 (Feb. 8, 1993), 1993 CFTC LEXIS 34. In *Armstrong*, the CFTC determined that if a publication has a specialized focus upon commodity transactions or is largely devoted to commodity trading, then the commodity trading advice is not "solely incidental" to the conduct of the publisher's business. *Id.*

The difference in language between the 40Act and the CEAct by the inclusion of subsection (C) (the "solely incidental" clause) make it necessary to resolve the constitutional question set forth by the concurring opinion in *Lowe*: can the CFTC require

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registration of the publishers of non-personal commodity investment advice and apply civil and criminal penalties to non-registered publishers of such information? Or, styled differently, can Section 4m of the CEAct be constitutionally applied so as to require registration of those who publish non-personal information and advice on commodity trading?

The First Amendment to the United States Constitution, the concurring opinion in *Lowe,* and *Ginsburg* make it clear that the publishers of books and newsletters concerning commodity trading cannot be required to register. In *Lowe*, Justice White, writing for a three-judge concurrence which rejected the SEC's argument that the registration requirement could be considered a legitimate regulation of entry into a profession, stated:

> Where the personal nexus between professional and client does not exist, and a speaker does not purport to be exercising judgment on behalf of any particular individual government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech; it becomes regulation of speaking or publishing as such, subject to the First Amendment's command that "Congress shall make no law abridging the freedom of speech, or of the press."

Lowe, 472 U.S. at 232. Although the majority in Lowe focused on the statute, it recognized that its interpretation of the 40Act was dictated by the First Amendment: "the principle that the government may restrict entry into professions and vocations through licensing schemes has never been extended to encompass the licensing of speech per se.... At some point, a measure is no longer a regulation of a profession but a regulation of speech...." *Id.* at 229-30.

Justice White spelled out the well-established U.S. constitutional principle that governments cannot license speech or the press. Some forms of state regulation and licensing of professionals are permissible even if they have an incidental effect

on freedom of speech. *See Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (upholding disbarment of attorney who illegally solicited clients). However, decisions upholding professional licensing schemes focus on the fiduciary, personal relationships that exist between professionals and their clients.

In contrast, the government may not license non-personal publishers. *Lowe* held that to require registration or licensing of individuals before they were allowed to publish securities information would constitute one of the most disfavored devices under the First Amendment–a "prior restraint" on speech.

In administering the CEAct, the CFTC has refused to follow *Lowe* or *Ginsburg*. Nor will the CFTC interpret the statute. It acknowledges that the question of Congressional intent should be determined by the Courts. *See In re Matter of Armstrong, supra*. Therefore, the CFTC does not exclude publishers of impersonal trading advice from the definition of CTA on statutory grounds, unless the publisher's advice meets the "solely incidental" requirement of the statute. *CFTC Interpretive Letter No. 96-56*, Comm. Fut. L. Rep. (CCH) P 26,761 (1996).

Yet, when the definition of CTA was at issue before the lower courts in another case, the CFTC took the positions that (i) the free speech question is not "ripe" for review because the administrative process has not be exhausted. and (ii) the publications at issue are "commercial speech" which are exempt from protection by the First Amendment. The 7th Circuit has rejected both of these arguments. *See, Commodity Trend Serv., Inc. v. CFTC*, No. 97-3477, slip op. at 6-15 (7th Cir. July 17, 1998), cited in App A, footnote 3. However, in an inconsistent position with the Commodity Trend case, the 7th Circuit has ordered Tokheim to immediately turnover his subscriber list and research materials without requiring the government to establish a record to permit demonstration that Tokheim's free speech rights have been "chilled" by the CFTC activities.

A prior restraint is any government action that "forbid[s] speech activities." *Alexander v. United States*, 509 U.S. 544, 550 (1993). And licensing requirements are the quintessential example of prior restraints. *See, e.g., id.*, 509 U.S. at 554 n.2; *Staub v. Baxley*, 355 U.S. 313, 322 (1958) (prior restraint is "requiring a permit or license [to speak or publish] which may be granted or withheld in the discretion of such official"); *Thomas v. Collins*, 323 U.S. 516 (1945) (holding registration requirement for labor organizers impermissible licensing of speech); Smolla, Smolla and Nimmer on Free Speech, § 8.01[1] (1994) (in practice, most prior restraints involve either an administrative rule requiring some form of licensure or permit before one may engage in expression...").

Indeed, the entire doctrine of prior restraint–at the heart of the instant case and the concurrence and the majority in *Lowe*–derives from the historical opposition, deeply rooted in Anglo-American law, to licensing of the press. *See, e.g.*, Emerson, The Doctrine of Prior Restraint, 20 Law & Contemp. Probs. 648 (1955). Over 350 years ago, John Milton recognized that freedom of the press was first and foremost a right to publish "without a license what formerly could be published only with one." (quote in *Lowe*, 472 U.S. at 205). *See also* Tribe, Constitutional Law, section 12-34 (2d ed. 1988) (discussing early opposition to licensing of the press). In the landmark case, *Lovell v. City of Griffin*, 303 U.S. 444, 451 (1938), the Supreme Court drew upon this tradition and struck down an ordinance on First Amendment grounds that prohibited the distribution of circulars, handbooks, and other materials without first obtaining a pen-nit from the city manager. The Court held that such a licensing scheme "strikes at the very foundation of freedom of the press.... The struggle for the freedom of the press was primarily directed against the power of the licensor." *Id.*; *see also Thornhill v. Alabama*, 3 10 U.S. 88, 97 (1940) (licensing scheme presents "not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence").

This Court recognized in *Lowe* that the 40Act's registration requirement, if applied to the publishers of non-personal securities advice, would be tantamount to an unconstitutional licensing of the

press. So too does application of Section 4m of the CEAct constitute an impermissible licensing of the press in violation of the First Amendment.

The fact that the publisher at issue in this case is small and specialized and his subscription base is less than 50 persons, does not lessen his right to the guarantees of the First Amendment. The First Amendment protects all publications: "The liberty of the press is not confined to newspapers and periodicals.... The press ... comprehends every sort of publication which affords a vehicle for information and opinion." *Lovell*, 303 U.S. at 452. The press is "[t]he lonely pamphleteer who uses carbon paper or a mimeograph just as much as ... the large metropolitan publisher." *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972).

Nor does it make any difference for First Amendment purposes that Tokheim's publications address only commodity concerns and markets. Publications addressing such matters are entitled to full First Amendment protection. Ginsburg, 915 at 736; *In re Petroleum Prods, Antitrust Litigation*, 680 F.2d 5, 7-8 (2d Cir. 1982) (newsletter dedicated exclusively to covering events in the petroleum industry entitled to First Amendment privilege against third-party discovery); *In re Pan Am Corp.*, 161 Bankr. 577, 584 (1993) (holding that the "financial press is fully shielded by umbrella of the First Amendment"); *National Life Ins. Co. v. Phillips Publ'g. Inc.*, 793 F. Supp. 627, 648 (D.Md. 1992) (financial newsletter entitled to constitutional defense of absence of malice standard in defamation case); *In re Scott Paper Co. Securities Litigation*, 145 F.R.D. 366, 370 (E.D. Pa. 1992) (holding that "the Supreme Court would be likely to hold, if squarely faced with the issue, that [investment newsletters] ... would also be protected by the free press cause of the First Amendment").

Tokheim's publications like any other publication must be free of prior restraint or licensure. The registration requirement of the CEAct is truly analogous to a licensing scheme and thereby constitutes a prior restraint in violation of First Amendment guarantees. Virtually any requirement of prior permission to speak

or publish constitutes a prior restraint and violates the First Amendment. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976) (noting that "[t]he thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights"); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971) (any prior restraint carries a "heavy presumption" against its constitutional validity).

Prior restraints on speech or publishing are only permissible if the government can demonstrate a clear and present danger or imminent threat to a protected compelling interest and that the restraint is narrowly drawn and the least restrictive alternative. *See, e.g., Near v. Minnesota*, 283 U.S. 697, 716 (1931) (suggesting that permissible prior restraint would be prohibiting the publication of "the sailing dates of transports or the number and location of troops"); *Freedman v. Maryland*, 380 U.S. 51, 58-60 (1965). In fact, the Supreme Court has held that national security is virtually the only interest sufficiently compelling to justify prior restraint. *See Brown v. Glines*, 444 U.S. 348, 353-58 (1980) (upholding military regulation requiring advance approval before circulating petition); but *see New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (rejecting national security concerns as basis to enjoin publication of Pentagon Papers). The CFTC simply can make no showing of such extreme circumstances to justify a prohibition on the publication of non-personal futures investment advice without registration. The publications at issue analyze the commodity and futures markets for less than 50 subscribers, a subject and distribution which is obviously without national security implications.

This Court in *Lowe* drew upon the law of prior restraint and held that individuals cannot be required to register before they can offer their opinions on the securities markets. As Justice White said in his concurrence, the Investment Advisers Act "may not constitutionally be applied to prevent [publishers] who are unregistered ... from offering impersonal investment advice through publications...". *Lowe*, 472 U.S. at 236. The same logic

and holding applies to the publishers of newsletters and books about commodity trading.

The advice published by Tokheim is the same as the type of information contained in Mr. Lowe's publications. Lowe's publications ranged from general commentary to advice on buying and selling specific securities. *Lowe*, 472 U.S. at 185. Likewise, Tokheim's publications range from generalized commentary on futures trading, to commentary on market conditions with particular commodities, to specific advice on buying and selling commodities. This Court also must hold that application of the registration requirement to any of Tokheim's newsletters–whether they are generalized information on commodity trading or specific trade recommendations about particular commodities–violates the First Amendment.

CFTC registration is not automatically granted, and when granted, it can be suspended or revoked. The CEAct contains various statutory disqualification from registration. 7 U.S.C. § 12a. For example, a person who has been found to have violated the CEAct or any CFTC regulation in the past can be denied registration in the future. 7 U.S.C. § 12a(3)(A). Thus, a person who published advice that was more than "solely incidental" to this publication of factual information without being registered could be found in violation of the CEAct, and could, therefore, be barred from obtaining registration to publish in the future. Similarly, a person registered to publish could violate a CFTC regulation, and as a result lose the registration. Another basis for the CFTC to deny, suspend or revoke registration is where "there is other good cause." 7 U.S.C. § 12a(3)(M). Furthermore, a person who wishes to contest a CFTC action to deny, suspend or revoke registration must go through an extensive administrative proceeding to do so. 17 C.F.R. § 3.60.

The CEAct thus prohibits an unregistered person from publishing impersonal advice that is more than "solely incidental" to the publication of data, and authorizes significant criminal and civil penalties for violation of the registration requirement. Such a

violation, if willful, subjects the violator to conviction of a felony punishable by a fine of as much as $1 million and imprisonment for as much as 5 years. 7 U.S.C. § 9. The CFTC can enter a cease and desist order against a person who has violated the CEAct registration provisions, thereby prohibiting the person from continuing to act without registration, and a violation of the cease and desist order itself carries criminal penalties. 7 U.S.C. § 13b. The CFTC can also impose a civil penalty of $100,000 per violation. 7 U.S.C. § 13a.

The 7th Circuit also justified its ruling by acceptance of the CFTC argument that the investigation of Tokheim includes an inquiry into the possibility that he committed fraud in violation of sections 4b & o of the CEAct. 7 U. S. C. § 6b & o. Section 4o of the CEAct makes it unlawful for any commodity trading advisor, by use of any instrument of interstate commerce to employ any device, scheme, or artifice to defraud. Section 4b applies substantially the same prohibition to the conduct of a futures commission merchant. Tokheim appeared at his deposition on November 13, 1997 to testify under oath that he did not act as a commodity futures merchant in violation of section 4b and that all of his advice is offered as non-personal trading advice. The CFTC persists to seek his subscriber list and research materials without any claim, must less proof, of relevance under either 4b or 4o.

B. The Petition Should Be Granted Because The CEAct is Facially Invalid Due To The "Overbreadth Doctrine".

The CTA registration requirement in the CEAct is unconstitutional on its face by the overbreadth doctrine. This is excessive delegation of power to a government agency in violation of the First Amendment. Because publishers have a First Amendment right to publish unlimited impersonal advice without (i) registering with the CFTC; (ii) coupling it with a greater amount of factual data; (iii) engaging in a particular business; (iv) seeking a determination from the CFTC that they are excluded from the definition of a CTA; or (v) being large publishers rather than small; the statute is facially defective in that it is unconstitutionally

overbroad and grants the right to the CFTC to discriminate between publishers. *Lowe v. Securities and Exchange Comm'n*, 472 U.S. 181 (1985).

Because the registration requirement for CTAs infringes protected speech, the CEAct registration provision is facially invalid under the overbreadth doctrine. *See Forsyth County, Georgia v. The Nationalist Movement*, 505 U.S. 123, 129 (1992); *Board of Trustees v. Fox*, 492 U.S. 469, 481-82, 484 (1989); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 504 n-11 (1981). Under the over-breadth doctrine, a statute is invalidated where it sweeps too broadly by penalizing speech that is constitutionally protected. *Forsyth County,* 505 U.S. at 130. The rationale for the doctrine is that the very existence of an overbroad law has the potential to *chill* the expression of persons not before the court. *Id.*, at 129.

Moreover, the nature of the speech of the party who seeks to apply the over-breadth doctrine does not determine whether the doctrine applies. *See Board of Trustees v. Fox*, 492 U.S. at 481-85. Rather, it is the speech restricted by the statute that is determinative. *Id.* Accordingly, no facts need be developed for this Court to make this review and no record of actual *chill* need be present in this case.

A determination that the CEAct's registration requirement for CTAs is unconstitutional on its face is appropriate in connection with an enforcement of subpoena action because it requires no factual development. *Federal Election Comm'n v. Machinists' Non-Partisan Political League,* 655 F.2d at 390 n.19; *Federal Trade Comm'n v. Miller*, 549 F.2d at 460.

No facts that the CFTC could develop during its investigation or during a subsequent administrative proceeding could affect the disposition of this issue, and there is, therefore, no reason to delay resolution by this Court. Moreover, in view of the CFTC's stated position that it will not consider whether the CEAct registration provision is unconstitutional, Tokheim has no

administrative remedy, and court action is needed. Because section 4m of the CEAct is unconstitutional on its face, the CFTC's Enforcement Petition to the lower court which asserts, in part, that Tokheim may be acting as an unregistered CTA, exceeds the constitutionally permissible scope of the CFTC's subject matter jurisdiction. Therefore the Court should not permit the enforcement proceeding to go forward to the extent the CFTC Investigative Order permits inquiry into whether there was a violation of section 4m. *See Resolution Trust Corp. v. Walde*, 18 F.3d 943 (D.C. Cir. 1994).

In *Walde*, the court found that the Resolution Trust Corporation ("RTC") was not authorized to subpoena personal financial information from possible subjects of RTC actions. The court, therefore, held that the RTC's Investigative Order was defective in this regard, and that the subpoena issued thereunder could not be enforced for such information. *Id.*

Tokheim was specifically told by the CFTC and the National Futures Association ("NFA"), the self regulatory organization for the futures industry, prior to his commencement of business and consistently throughout his business operation that his publishing activities were exempt from registration. Only in 1996, after Tokheim had been in business for over 7 years did the CFTC reverse its position. *CFTC Interpretive Letter No. 96-56*, Comm. Fut. L. Rep. (CCH) P 26,761 (1996).

Under the Enforcement Action, the CFTC could inquire into all facts bearing on whether Tokheim is required to register as a CTA based on his publishing activities. Because the registration requirement is unconstitutional on its face, this inquiry should not be permitted, and the lower courts should have required the CFTC to present its case and, thereafter, should have refused to enforce the Subpoena to the extent this inquiry and proceeding limits non-personal publication of advice.

CONCLUSION

The lower courts shifted the burden of proof of the existence of a prima facie case from the government to Tokheim with the assertion that Tokheim was obligated to do more than file his opposition and supporting affidavit, and appear by counsel at the hearing to preserve his right to be free from the entry of a default judgment. This shift of proof violated Tokheim's right to procedural due process before an enforcement of the subpoena may be made against him. Because the delivery of the subscriber list will result in a destruction of Tokheim's business, the government must be required to reach the higher standard of showing probable cause before the subpoena may be enforced.

The fact the District Court is permitted to enter enforcement orders without a hearing is why the government has been able to overreach Tokheim in this case. This Court is requested to accept this case to be certain the lower courts understand that the decision in *Powell* demands a hearing to create a record to permit a review to be certain the *Powell* criteria have been met.

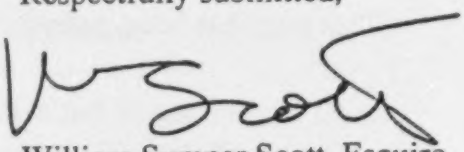
In regard to the application of the First Amendment to this case, a record is not necessary for a review similar to the one this Court conducted in *Lowe*. Tokheim requests a ruling to hold that the safeguards afforded those who publish non-personal securities advice extend to those who publish similar information related to commodities. From both the publishers and the investors viewpoint, the status of the information provided by securities and commodities publishers are the same.

This Court has found that the 40Act cannot prohibit the publication of impersonal advice. Though the CEAct is substantially the same as the 40Act, the CFTC discriminates between commodity publishers based upon an evaluation of their other business activities. Tokheim admits he publishes only non-personal commodity advice, but denies that it is a valid justification to require him to register while other publishers of commodity

advice, who also publish news of general interest, are exempt from registration.

In addition, Tokheim's business will be destroyed by the CFTC proposal to contact some or all of his 50 subscribers. Once his business in destroyed, Tokheim will not be a position to continue the legal battle necessary to continue the facial challenge to the CEAct. Accordingly, the need for acceptance of review of this case is essential to the preservation of the First and Fifth Amendment rights of all publishers of non-personal commodity trading information and opinion.

Respectfully submitted,



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In the
United States Court of Appeals
for the Seventh Circuit

No. 97-4120

COMMODITY FUTURES TRADING COMMISSION,

Applicant-Appellee,

v.

RICHARD W. TOKHEIM,

Respondent-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 97 C 6138 Suzanne B. Conlon, Judge.

ARGUED JUNE 2, 1998-DECIDED AUGUST 18, 1998

Before FLAUM, MANION, and DIANE P. WOOD, Circuit Judges.

FLAUM, Circuit Judge. This is an appeal by Richard W. Tokheim of an order granting enforcement of an administrative subpoena issued by the Commodity Futures Trading Commission (CFTC or "the Commission"). For the reasons stated herein, we affirm the district court's order.

I.

The CFTC, which is charged with implementing the Commodity Exchange Act ("the Act"), 7 U.S.C. §§ 1-25 basic purpose of which is the comprehensive regulation of the "volatile and esoteric futures trading complex," *CFTC v. Schor*, 478 U.S. 833, 836 (1986) (quotation omitted)-is granted broad powers under the Act to

investigate compliance with the Act's provisions. *See, e.g., American Int'l Trading Co. v. Bagley*, 536 F.2d 1196, 1197-98 (7th Cir. 1976) (Clark, J.). On August 29, 1996, pursuant to 7 U.S.C. § 15, the Commission entered an order of investigation entitled "In the Matter of Richard W. Tokheim." The order empowered certain CFTC officials to investigate whether Tokheim or entities associated with him (including his business, the Investment Research Company ("IRC")) had violated provisions of the Act and CFTC regulations. According to the order, the investigation would focus on, *inter alia*, whether Tokheim had violated 7 U.S.C. § 6m(1), which requires individuals who provide advice regarding commodities to register with the CFTC as commodity trading advisors (CTA),[2] and 7 U.S.C. §§ 6b & 6o(1), both of which

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[2] The Act defines the term "commodity trading advisor" as any person who

(i) for compensation or profit, engages in the business of advising others, either directly or through publications, writings, or electronic media, as to the value of or the advisability of trading in

(I) any contract of sale of a commodity for future delivery made or to be made on or subject to the rules of a contract market;

(II) any commodity option authorized under section 6c of this title; or

(III) any leverage transaction authorized under section 23 of this title; or

(ii) for compensation or profit, and as part of a regular business, issues or promulgates analyses or reports concerning any of the activities referred to in clause W.

7 U.S.C. § 1a(5)(A). The Act excludes from this definition, inter alia, a publisher or producer of print or electronic data, but only if their commodity-related services are furnished "solely incidental to the conduct of their business or profession." *Id.* § 1a(5)(B) & (C).

prohibit fraudulent conduct in connection with the commodity futures markets.

According to the Commission, Tokheim, through his business, has held himself out to the public as a commodity broker for a number of years. Tokheim, who resides in Omaha, Nebraska, publishes a "report" analyzing the past price performance of various commodities. He has advertised his various commodity trading systems to the public through direct-mail solicitations, in a futures industry trade publication, in the Omaha telephone book "yellow pages," and on the internet, and he offers personal contact to his customers, who are invited by Tokheim's materials to "please call Rich" if they have any questions. The Commission believes that Tokheim's activities merit an investigation into whether he is operating as an unregistered CTA, in violation of 7 U.S.C. § 6m(1). In addition, the Commission asserts that, based upon complaints from some of Tokheim's customers, it has reason to believe that Tokheim has advertised fraudulently and provided his customers with fraudulent advice, in violation of 7 U.S.C. §§ 6b & 6o(1).

As part of its investigation into Tokheim's activities, officers in the Commission's Chicago Regional Office issued a subpoena to Tokheim on January 8, 1997, ordering him to appear at the United States Attorney's Office in Omaha on February 19, 1997. The subpoena sought Tokheim's testimony, and it also sought documents relating to his business, including IRC's client lists, advertisements, risk disclosure statements, and any statements for commodity accounts owned either by Tokheim or IRC. Tokheim sent a letter to CFTC officials on February 12, 1997, informing them that he would not comply with the subpoena because he was not under the CFTC's jurisdiction, and he did not appear at the Office of the United States Attorney on February 19. Subsequent repeated efforts by Commission investigators and attorneys to secure Tokheim's compliance with the subpoena proved unavailing.

On August 29, 1997, the Commission therefore filed its subpoena enforcement action in the district court, pursuant to 7 U.S.C. § 15.

The magistrate judge to whom the proceedings were referred issued an order requiring Tokheim to appear before the court and to show cause why the subpoena issued by the Commission should not be enforced. The magistrate judge ultimately set October 23, 1997, as the date for the hearing; however, neither Tokheim nor his lead counsel appeared at the hearing. Although local counsel represented Tokheim at the hearing, he had no familiarity with the facts of the case. Accordingly, the magistrate judge, upon reviewing the documents submitted by the CFTC, in conjunction with Tokheim's failure to explain why the subpoena should not be enforced, ordered Tokheim to testify and produce the requested documents on November 13, 1997. The district court judge subsequently adopted this order.

Tokheim appeared at the Omaha Office of the United States Attorney on November 13, and he answered questions from CFTC investigators regarding his activities in the commodity futures industry. While he did provide the CFTC with some documents related to his business, he refused to relinquish a list of his subscribers, of which Tokheim claims there are approximately 45, as well as the materials that he sends to his subscribers.[3] The Commission believes that the withheld materials would help it to determine whether Tokheim has violated the Act. It would like to use Tokheim's subscriber list to telephone the sub-scribers and determine whether the possible violations can be substantiated. Though the Commission filed a motion to hold Tokheim in contempt for failing to comply with the district court's enforcement order, *See* 7 U.S.C. § 15, the motion was deferred by the Commission pending the resolution of this appeal.

II.

On appeal Tokheim raises two principal arguments, neither of which has any merit. First, he argues that the Commission lacks

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[3] Tokheim contends that his business would be irreparably damaged if the Commission were to contact his subscribers.

authority to enforce its investigatory subpoena against him because his activities fall under an exclusion from the Act's coverage. His second argument is that the Commission lacked probable cause to enforce the subpoena.[4] We consider these arguments in turn.

Tokheim argues that he provides only "impersonal" trading advice to his subscribers, much as a newspaper would, and that he is not required to register as a CTA. He contends that he is exempt from the Act's coverage because he does not furnish commodity trading advice as defined by the Act.[5] *See* 7 U.S.C. §§ 1a(5)(b) & 6m(1); *see also supra* note 1. Tokheim argues that the CFTC must

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[4] During rebuttal at oral argument, Tokheim also raised the contention that the Act's definition of a CTA, as interpreted by the CFTC, is facially unconstitutional. We recently have held as ripe for adjudication a facial challenge to the Act's registration requirement for CTAs. See *Commodity Trend Serv., Inc. v. CFTC*, No. 97-3477, slip op. at 6-15 (7th Cir. July 17, 1998). However, we need not consider whether Tokheim's facial challenge is similarly ripe for adjudication, as it is manifest that he has waived the claim. First, Tokheim failed to enter more than a perfunctory appearance by local counsel in the district court at the October 23 hearing, and he did not argue to that court that the statute is facially unconstitutional. Moreover, he presented the argument in only cursory fashion in his brief to this Court, and he did not raise the issue at oral argument until rebuttal. "We repeatedly have made clear that perfunctory and undeveloped arguments ... are waived (even where those arguments raise constitutional issues)." *United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir. 1991).

[5] To the extent that the Commission is seeking Tokheim's customer lists and other documents for the purpose of proving fraudulent conduct, we also interpret Tokheim to be arguing that this component of the Commission's investigation will fail to establish that he has acted fraudulently in a manner that would enable the Commission to regulate his activities under the Act.

demonstrate to the court that it has jurisdiction over him before it can enforce the subpoena against him.

The basic failing of this argument is that it conflates the issue of whether the Commission may investigate to determine whether conduct falls within its jurisdiction with the ultimate issue of whether conduct does in fact fall within its jurisdiction. While Tokheim's argument goes to the latter issue, the issue presently before us is only the scope of the Commission's investigatory powers. If, as Tokheim argues, the Commission first had to make a valid finding of coverage before it could enforce an investigatory subpoena, it would be unable to fulfill its investigatory responsibilities under the Act. The traditional understanding of an agency's investigatory powers is precisely to the contrary. *See, e.g., United States v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950) (recognizing that, like a grand jury, an agency is empowered to "investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not"); *American Int'l Trading Co. v. Bagley*, 536 F.2d 1196, 1198 (7th Cir. 1976) (Clark, J.) (holding that it is the role of the CFTC, and not the courts, "to determine in the first instance the question of coverage in the course of a preliminary investigation into possible violations"). Tokheim's contention that he is exempt from the Act may prove to be true following the Commission's investigation. This possibility, however, does not necessitate that the Commission establish that Tokheim is covered by the Act even before it begins its investigation.

Tokheim also argues that the Commission failed to establish probable cause to enforce its subpoena, particularly with respect to his customer lists and proprietary documents. This argument overlooks the fact that this threshold never has been required by the federal courts with respect to administrative subpoenas. *See, e.g., United States v. Powell*, 379 U.S. 48, 57 (1964); *Morton Salt Co.*, 338 U.S. at 642-43. Rather, we require agencies to satisfy a lower threshold requirement, which is the inquiry to which we now turn.

In *Powell*, the Supreme Court discussed the threshold showing required of an agency in order to obtain judicial enforcement of an administrative subpoena. *See* 379 U.S. at 57-58. The Commission must establish that (1) its investigation is being conducted pursuant to a legitimate purpose, (2) the specific inquiry may be relevant to that purpose, (3) the information sought is not already in the Commission's possession, and (4) the proper administrative procedures required by the applicable statutes and regulations have been followed. *See id.* We have stated the standard somewhat differently. *See, e.g., EEOC v. Quad/Graphics, Inc.*, 63 F.3d 642, 644-45 (7th Cir. 1995) ("As a general proposition, courts enforce an administrative subpoena if it seeks reasonably relevant information, is not too indefinite, and relates to an investigation within the agency's authority."); *see also In re Sealed Case (Administrative Subpoena)*, 42 F.3d 1412, 1415 (D.C. Cir. 1994) (applying the same standard). In any event, both articulations of the standard have the same effect in operation, particularly in light of the fact that we have also emphasized that the court must be satisfied that the demand for information has not "been made for an illegitimate purpose," and that an "excessively burdensome" demand, compliance with which would threaten the normal operation of a respondent's business, will not be enforced. *See Quad/Graphics, Inc.*, 63 F.3d at 645.

In the instant case, the district court did not evaluate the propriety of enforcing the subpoena against Tokheim according to the analyses set out in either *Powell* or *Quad/Graphics*. We recognize that this was largely due to the fact that Tokheim did not adequately appear in the district court at the hearing scheduled to contest the subpoena's validity, rendering the district court's order akin to a default judgment. Nonetheless, it would have been helpful if the district court had referenced the materials entered into the record by the Commission and proffered some analysis in this regard. In any event, in light of the long delay in enforcing the subpoena that has already resulted from Tokheim's contumacy, as well as the clear support for the subpoena that is contained in the record, we shall proceed to consider the propriety of enforcing the

subpoena, rather than order a remand that would lead to an even longer delay.

The Commission concedes that its power to investigate is not unfettered and that its subpoenas may only be issued in good faith and to serve legitimate purposes. *Cf. Quad/Graphics*, 63 F.3d at 644-45. Applying *Powell's* inquiry to the facts of this case, *See* 379 U.S. at 57-58, we agree with the Commission that this is not an instance of impermissible overreaching. First, the purpose of the investigation is legitimate, as 7 U.S.C. § 12(a) authorizes the Commission to investigate potential violations of the Act. In response to evidence that Tokheim may be violating certain provisions of the Act, including documents and solicitations that the Commission has placed in the record, the Commission seeks information from Tokheim in order to determine whether he has indeed violated registration and fraud provisions of the Act, id. §§ 6m(1), 6b & 6o(1), and the requested documents and materials are manifestly relevant to this inquiry. Third, there is no dispute that the Commission does not already possess the requested information, including Tokheim's customer lists. Finally, Tokheim has pointed to no procedural irregularities in connection with the Commission's investigation. The Commission issued both its order of investigation and its subpoena as authorized under 7 U.S.C § 15, and it filed the instant enforcement proceedings when Tokheim refused to comply with the subpoena. Moreover, Tokheim has not demonstrated that the Commission is engaged in a wide-ranging fishing expedition supported by indefinite investigatory demands. *Cf. Quad/ Graphics, Inc.*, 63 F.3d at 645. Rather, the Commission has requested specific information from Tokheim after receiving evidence indicating that Tokheim may be violating certain provisions of the Act. Under these circumstances, we hold that the district court appropriately enforced the Commission's subpoena.

Tokheim also argues that the CFTC is conducting its investigation in bad faith and that his business will be destroyed if he turns over his customer lists and proprietary documents to the Commission. *Quad/Graphics* indicates that the courts will consider such arguments in determining whether to enforce an administrative

subpoena. *See* 63 F.3d at 644-45. In the instant case, however, Tokheim makes these allegations without any factual support in the record. Tokheim had an opportunity to establish factual support for his claims, but he forfeited it when he failed adequately to appear at the district court's hearing on October 23. Accordingly, we reject Tokheim's remaining arguments because they are unsupported by the record.

For the foregoing reasons, we affirm the district court's order enforcing the subpoena of the CFTC.

A true Copy:

Teste:

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Clerk of the United States Court of
Appeals for the Seventh Circuit

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UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago, Illinois 60604

October 22, 1998

Hon. JOEL M. FLAUM, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

Hon. DIANE P. WOOD, Circuit Judge

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 97 C 6138 – Suzanne B. Conlon, Judge.

COMMODITY FUTURES TRADING COMMISSION,

Applicant-Appellee,

No. 97-4120 v.

RICHARD W. TOKHEIM,

Respondent-Appellant.

ORDER

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled case on October 1, 1998, by respondent-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

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United States District Court, Northern District of Illinois

Name of Assigned Judge
or Magistrate Judge: Suzanne B. Conlon

CASE TITLE: COMMODITY FUTURES TRADING COMM Vs. RICHARD W. TOKHEIM

CASE NUMBER: 97 C 6138

DATE: 12/4/97

Document Number: 24

MINUTE ORDER of 12/4/97 by Hon. Suzanne B. Conlon :

Respondent's suplicative motion for reconsideration of this court's order of 11/12/97 [22-1] and renewed motion for a stay [22-2] are denied.

Mailed notice (mk) [Entry date 12/11/97]

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United States District Court, Northern District of Illinois

Name of Assigned Judge
or Magistrate Judge: Suzanne B. Conlon

CASE TITLE: COMMODITY FUTURES TRADING COMM Vs. RICHARD W. TOKHEIM

CASE NUMBER: 97 C 6138

DATE: 11/12/97

DOCKET ENTRY:

(10) [Other docket entry] The court has reviewed respondent's "Notice of Appeal and Renewed motion for Stay" and the applicant's response, as well as the record in this case. The court finds that respondent's appeal and motion for stay conclusively lack merit and were filed for purposes of delay. Accordingly, the order of the Magistrate Judge issued on October 23, 1997 is adopted and the motion to stay is denied.

/s/ Suzanne B. Conlon

☒ Notified counsel by telephone.

☒ Copy to judge/magistrate judge. Rosemond

courtroom deputy's initials: jhc

date mailed notice: NOV 21 1997

Document Number: 20

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United States District Court, Northern District of Illinois

Name of Assigned Judge
or Magistrate Judge: Suzanne B. Conlon

CASE TITLE: COMMODITY FUTURES TRADING COMM Vs. RICHARD W. TOKHEIM

CASE NUMBER: 97 C 6138

DATE: 10/30/97

DOCKET ENTRY:

(10) [Other docket entry] Respondent's motion to dismiss, for extension of time or, in the alternative, for a protective order and for attorneys fees and costs is denied.

/s/ Suzanne B. Conlon

☒ Docketing to mail notices

courtroom deputy's initials: jhc

date mailed notice: NOV 07 1997

Document Number: 15

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UNITED STATES DISTRICT COURT
for the
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

In the Matter of An Application to Enforce An Administrative Subpoena of the	CIVIL ACTION NO.
COMMODITY FUTURES TRADING COMMISSION,	
Applicant,	ORDER REQUIRING COMPLIANCE WITH A
V.	SUBPOENA OF THE COMMODITY FUTURES
RICHARD W. TOKHEIM,	TRADING COMMISSION
Respondent.	

Upon the Application of the Commodity Futures Trading Commission made pursuant to Section 6(c) of the Commodity Exchange Act, as amended, 7 U.S.C. S 15 (1994), for an Order requiring the respondent Richard W. Tokheim ("Tokheim") to appear and testify and produce records in connection with a private investigation entitled "In the Matter of Richard W. Tokheim" in accordance with an administrative subpoena duly issued and served by the Commodity Futures Trading Commission upon said respondent, and it appearing to the Court from the Application for Order Requiring Compliance With An Administrative Subpoena, the exhibits to the Application, and all papers filed in support thereof, and the response thereto, that said respondent has refused to appear and testify and produce documents as required by said subpoena without good cause,

IT IS HEREBY ORDERED that the Application of the Commodity Futures Trading Commission for an Order Requiring Compliance With An Administrative Subpoena is granted, and

IT IS FURTHER ORDERED that the respondent Tokheim shall appear at the Office of the United States Attorney, 215 North 17th Street, Room 7401, Omaha, Nebraska 68102, on November 13, 1997 at 10:00 a.m., to give investigative testimony and produce all documents specified in the subpoena issued by the Commission's staff dated January 8, 1997.

/s/ W. Thomas Rosemond, Jr.
United States Magistrate Judge

Dated: October 23, 1997